IN THE
SUPREME COURT OF MISSOURI

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No. SC85740

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STATE OF MISSOURI ex rel.
ST. LOUIS COUNTY, MISSOURI, et al.,

Relators,

v.

THE HON. DAVID LEE VINCENT, III,

Respondent.

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BRIEF OF ATTORNEY GENERAL OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF RELATORS

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JEREMIAH W. (JAY) NIXON
Attorney General

PAUL WILSON
Assistant Attorney General
Missouri Bar No. 40804

DANIEL HALL
Assistant Attorney General
Missouri Bar No. 41663

Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-7094 (facsimile)

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INTEREST OF AMICUS

Sovereign immunity plays a vital role in the day-to-day affairs of the State and in much of the litigation in which the Attorney General's Office is involved. Although the State takes no position on the extent to which Relators share the State's immunity, the State has a profound interest in ensuring that the doctrine continues to be articulated and applied according to this Court's precedents.

In particular, *State ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.2d 188 (Mo. App. W.D. 2003), upon which Relators rely, is an accurate statement of the law and a faithful application of this Court's decisions in *Gas Service Company v. Morris*, 353 S.W.2d 645 (Mo. 1962), and *Kleban v. Morris*, 247 S.W.2d 832 (Mo. 1952). In contrast, *Palo v. Stangler*, 943 S.W.2d 683, 685 (Mo. App. E.D. 1997), upon which Respondent relies, plainly misstates the law and ignores this Court's precedents.

Accordingly, although Respondent offers sound prudential reasons why this Court should not, in its discretion, make its preliminary writ permanent, the State urges the Court to affirm the holdings of *Gas Service Company* and *Kleban*, as reflected in the recent *MSHP* case, should the Court decide to reach the merits of the arguments presented by the parties.

INTRODUCTION

Relators in this action are St. Louis County, and two county officials: the St. Louis County Recorder of Deeds, Janice Hammonds; and the St. Louis County Director of Revenue, Norris Acker ("Relators"). Relators seek a Permanent Writ of Prohibition from this Court to prevent Respondent Honorable David Lee Vincent, III ("Respondent") from continuing to exercise jurisdiction over Count I in the underlying action, *Investors Title, Inc. v. Janice Hammonds, et al.*, Case Number 01CC-004336 (Circuit Court of St. Louis County).

In the underlying action, Investors Title, Inc. ("Investors") seek to recover overpayments from Relators based on a former St. Louis County employee's criminal practice of filling in blank checks provided by Investors for an amount in excess of amounts owed for services provided. In Count I, Investors assert a Common Law Refund claim in which they seek monetary damages in an amount equal to the overpayments pocketed by the employee. Though Respondent found other counts of Investors' petition to be barred by sovereign immunity, Respondent denied Relators' sovereign immunity motion with respect to Count I because it found the count to be "contractual in nature."

Investors' case is going to trial regardless of whether this Court makes its preliminary writ permanent. Investors have three federal claims, based on essentially the same allegations that underlie Count I, as to which Relators are seeking no protection from this Court.

ARGUMENT

A. Waiver Necessary To Avoid Sovereign Immunity Bar

The premise underlying the doctrine of sovereign immunity is that the State may not be sued without its consent. *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995); *Kleban*, 247 S.W.2d at 836. This doctrine applies to all cases, however styled, and all claims, however characterized. *See Carson v. Sullivan*, 223 S.W. 571, 571 (Mo. banc 1920) (sovereign immunity bars injunctive claims as well as claims for damages). Though not limited to claims for money, it is absolutely clear that, where "the action is for the recovery of money, held by the state treasury, . . . the state is entitled to invoke its sovereign immunity unless it expressly consents not to do so." *Community Fed. Sav. & Loan v. Director of Revenue*, 752 S.W.2d 794, 796 (Mo. banc 1988).

Such consent, or waiver, may only be given, by statute or constitutional provision. *State ex rel. Regional Justice Information Service Commission v. Saitz*, 798 S.W.2d 705, 708 (Mo. banc 1990). Thus, the power to waive belongs solely to the General Assembly and cannot be usurped by any other state actor, *State ex rel. New Liberty v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985), including the state's courts.

Waivers are not difficult to find. For instance, the Missouri Constitution waives sovereign immunity for claims arising out of the use of the State's power of eminent domain, *see* Mo. Const. Art. I, § 26, and for claims under the Hancock Amendment, *see* Mo. Const. Art. X, § 23. The General Assembly has expressly consented to be sued on certain tort claims, and that consent is embodied in § 537.600.1, RSMo 2000. And, the General Assembly has consented to be sued on any legislatively authorized contract. *V.S. DiCarlo*

Construction Company, Inc. v. State, 485 S.W.2d 52 (Mo. 1972).[1] These are all examples of consent, which is the sole means of avoiding the State's sovereign immunity. As set forth below, the various creative attempts by Investors and Respondent to show waiver are legally invalid.

B. Investors Failed To Plead Waiver of Sovereign Immunity

Before examining whether Respondent can establish the existence of waiver, it is important to note that Investors failed to plead such in the underlying action. *See* Investors' First Amended Petition. Concerning the writ request here, such failure is fatal for Respondent. Under Missouri law, sovereign immunity is not an affirmative defense, and "the claimant must plead an exception or waiver." *State ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.2d 188, 191 (Mo. App. W.D. 2003) (citing *Brennan By and Through Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434, 436 (Mo. App.

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[1] This Court has never extended *V.S. DiCarlo* to cases involving a political subdivision's sovereign immunity. This Court has held that only the General Assembly can waive sovereign immunity and consent to suit, and *V.S. DiCarlo* stands for that proposition that such consent is fairly implied from the General Assembly's authorization of a contract. Accordingly, even had an express contract – legislatively authorized at the county level – been involved in this case, which it was not, it is not clear whether such consent from the county's legislative body, rather than the General Assembly, is sufficient to waive sovereign immunity and consent to suit.

1997)); *accord State ex rel. Public Housing Agency of the City of Bethany*, 98 S.W.3d 911, 915 (Mo. App. W.D. 2003). Accordingly, Relators' Motion to Dismiss Count I on the basis of sovereign immunity should have been granted.

C. Missouri Supreme Court Precedent Holds That Sovereign ImmunityBars Claims For "Money Had and Received"

Respondent describes Count I as a claim for "money had and received," and attempts to show waiver by characterizing it as contractual in nature. Respondent's Suggestions in Opposition To The Issuance Of A Writ Of Prohibition ("Respondent's Suggestions in Opposition") at 9. This tactic must fail, however, because it is directly contrary to this Court's precedent in *Gas Service Company v. Morris*, 353 S.W.2d 645 (Mo. 1962), and *Kleban v. Morris*, 247 S.W.2d 832, 836 (Mo. 1952).

In *Gas Service Company*, 353 S.W.2d at 645, the plaintiff filed suit against the state for "money had and received," seeking to recover the amount of a domestication tax that had been allegedly illegally assessed against it. The plaintiff asserted a waiver of sovereign immunity, but the Missouri Supreme Court rejected that argument in no uncertain terms and re-affirmed that the doctrine of sovereign immunity applies in precisely that (and the present) circumstance:

> [Plaintiff] contends, however, that even if the well-settled proposition that the state may not be sued without its express consent is applicable, the state has consented to be sued in this action for money had and received. We have the opinion that [plaintiff's] position is untenable and that its contention has been ruled adversely to it in *Kleban v. Morris,* [247 S.W.2d at 837-9].

Gas Service Company, 353 S.W.2d at 648.

In *Kleban,* 247 S.W.2d at 832, the plaintiffs sued certain state officials to recover payments of use taxes on motor vehicles collected under a statute subsequently declared to be unconstitutional. Ruling that consent could not be implied from the constitutional provision prohibiting deprivation of private property without due process of law, this Court held that sovereign immunity barred this claim for monetary damages. *Id.* at 837-38.

Gas Service Company and *Kleban* were recently analyzed by the Western District Court of Appeals in *State of Missouri ex rel. Missouri State Highway Patrol v. Atwell,* 119 S.W.3d 188 (Mo. App. W.D. 2003). In *Atwell*, the plaintiff, alleging that the Highway Patrol had illegally transferred his seized property (cash) to federal authorities, filed a claim for money had and received seeking return of said property. *Id.* at 189. In support of this claim, the plaintiff relied on *Karpierz v. Easley*, 31 S.W.3d 505, 511 (Mo. App. W.D. 2000), where the court stated that "[a] claim for money had and received is contractual in nature and thus not barred by sovereign immunity." The *Atwell* court noted that its prior above-quoted statement in *Karpierz* was dicta and "incorrect," and that *Kleban* and *Gas Service Co.* stand for the proposition that sovereign immunity does in fact bar actions for

money had and received. *Atwell*, 119 S.W.3d at 190-91. This immunity from suit can be waived but such waiver must be express. *Id.*

In denying Relators' Motion for Judgment on the Pleadings on this claim in the underlying action, Respondent relied upon *Palo v. Stangler*, 943 S.W.2d 683, 685 (Mo. App. E.D. 1997) for the proposition that sovereign immunity does not bar claims for money had and received. As *Gas Service Company* and *Kleban* make clear, this statement of law is simply mistaken. *See also State ex rel. Missouri Division of Family Services v. Moore*, 657 S.W.2d 32, 34-35 (Mo. App. 1983) (sovereign immunity bars claim for wrongfully withheld money against state).

Gas Service Company and *Kleban* are directly on point. In both cases, and in this case, certain parties are seeking to recover from a sovereign amounts paid in excess of that allowed under law. This is a claim for monetary damages, and it is barred by sovereign immunity.

D. Relators' Reliance On Cases Involving Non-State Funds Is Misplaced

In opposing Relators' request for a Writ of Prohibition, Respondent ignores this Court's plain holdings in *Gas Service Company* and *Kleban*, and relies, instead, on two cases that can be easily distinguished. Respondent points to *Reidy Terminal, Inc. v. Director of Revenue, et al.*, 898 S.W.2d 540 (Mo. banc 1995) and *River Fleets, Inc. v. Carter, et al.*, 990 S.W.2d 75 (Mo. App. W.D. 1999) for the proposition that sovereign immunity does not bar a claim for overpaid fees. Respondent's Suggestions in Opposition at 9. But, both of these cases involved fee overcharges by the Petroleum Storage Tank

Insurance Fund ("PSTIF"). *Reidy Terminal, Inc.*, 898 S.W.2d. at 540; *River Fleets*, 990 S.W.2d at 76. Missouri law expressly provides that PSTIF fees are not state funds and the liability of the fund is not a liability of the state. *See* § 319.129.1, RSMo 2000, § 319.131.4, RSMo 2000. In fact, the *River Fleets* court expressly noted that "[i]f the fund's liability is not the liability of the state of Missouri, then *ipso facto*, the State's [sovereign] immunity from liability does not apply." *River Fleets*, 990 S.W.2d at 78. Here, Investors seek monetary damages from the sovereign, and accordingly, should they recover a judgment, it would become a liability of the sovereign. As a result, Respondent's reliance on these two cases is misplaced.

E. Respondent's Characterization of Investors' Claims as Contractual In Nature Does Not Avoid Sovereign Immunity

Respondent asserts that Count I is based upon a contractual relationship between Investors and Relators whereby Relators provided services for a fee, thereby constituting a waiver of sovereign immunity. Respondent's Suggestions in Opposition at 11. To support this assertion, Respondent relies upon *V.S. DiCarlo Construction Co., Inc. v. State of Missouri*, 485 S.W.2d 52 (Mo. 1972). While *V.S. DiCarlo* does indicate that there is a sovereign immunity exception for claims based upon valid contract, contrary to Respondent's assertions, this exception does not extend to claims that are "equitable" or "contractual in nature." Therefore, Respondent's reliance on this case is misplaced.

In *V.S. DiCarlo*, the plaintiff was a contractor that sued the state for the breach of a validly executed construction contract. *Id.* at 52. Declining to apply sovereign immunity,

this court ruled that the General Assembly had consented to suit by appropriating money for the contract. *Id.* at 55. The court noted that because the State would have the right to sue the contractor should the contractor fail to perform its obligations under the contract, ruling otherwise would result in a contract "lacking in mutuality," *id*. at 54, and "would assume bad faith on the part of the General Assembly," *id*. at 55. This decision does not, as Respondent asserts, stand for the proposition that sovereign immunity does not bar any claim that sounds in contract. Rather, this case sets forth the simple principle that when the General Assembly authorizes a contract, it consents to be sued on that contract. *See also Gavan v. Madison Memorial Hospital*, 700 S.W.2d 124, 127 (Mo. App. E.D. 1985) ("when the state enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance just as any private citizen.") (emphasis added).

In contrast, no such consent can be attributed to claims for "money had and received," which by their very nature are based on "an obligation to do justice even though it is clear that no promise was ever made or intended." *Karpierz v. Easley*, 68 S.W.3d 565, 570 (Mo. App. W.D. 2002) (internal quotation marks omitted). This is precisely the point that this Court made in *State ex rel. Department of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. banc 1985). The Court explained that the waiver of sovereign immunity for suits to enforce legislatively authorized contracts that was described in *V.S. DiCarlo* rests solely and completely on the General Assembly's demonstrated willingness to pay for the contracted services. But, where "there is no indication whatsoever that the legislature

intended for the state to make any payment whatsoever," the sovereign immunity waiver described in *V.S. DiCarlo* does not exist. *Id.*

The doctrine of sovereign immunity leaves it to the sole and unreviewable discretion of the General Assembly to decide whether and under what circumstances to "do justice." *See Carpenter v. King*, 679 S.W.2d 866, 868 (Mo. banc 1984) (even express waivers of sovereign immunity must be strictly construed because the doctrine is designed to protect the State's sovereign rights and capacity to perform necessary government functions). No court has authority to usurp that power by forging common law exceptions to sovereign immunity under the guise of a "quasi-contract" analysis -- and this Court in *Gas Service Company* and *Kleban* declined to do exactly that.

Accordingly, because there is no allegation that Investors' Count I arises out of a legislatively authorized contract, and thus that a waiver of sovereign immunity has been authoritatively made, this Court must issue a writ prohibiting Relators from exercising jurisdiction over Count I.

CONCLUSION

For the reasons set forth above, although Respondent offers sound prudential reasons why this Court should not, in its discretion, make its preliminary writ permanent, the State urges the Court to affirm the holdings of *Gas Service Company* and *Kleban*, as reflected in the recent *MSHP* case, should the Court decide to reach the merits of the arguments presented by the parties.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Paul C. Wilson
Assistant Attorney General
Missouri Bar No. 40804

Daniel Y. Hall
Assistant Attorney General
Missouri Bar No. 41106

Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321
(573) 751-7094 (facsimile)

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing brief was mailed, postage prepaid, via United States mail, on this ___ day of March, 2004, to:

Patricia Redington, County Counselor
Cynthia L. Hoemann
Micki Wochner
9th Floor
41 South Central Avenue
Clayton, MO 63105

Attorneys for Relators

Charles S. Kramer
Nelson Lewis Mitten
7th Floor
7700 Bonhomme Avenue
Clayton, MO 63105

Attorneys for Respondent

_____
Assistant Attorney General

Certification of Compliance

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 2,951 words.

The undersigned further certifies that the disk simultaneously filed with the hard copy of the brief has been scanned for viruses and is virus-free.

_____
Assistant Attorney General